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IN THE COURT OF APPEAL OF THE STATE OF CALIFORNIA

SECOND APPELLATE DISTRICT

DIVISION TWO

ROBERT BOLLINGER,

Plaintiff and Appellant,

v.

WOLFGANG PUCK CATERING
AND EVENTS, LLC, et al.

Defendants and Respondents.

B265560

(Los Angeles County
Super. Ct. No. BC537875)

APPEAL from a judgment of the Superior Court of Los Angeles County.
Stephanie M. Bowick, Judge. Affirmed.

Robert Bollinger, in pro. per., for Plaintiff and Appellant.

Sheppard, Mullin, Richter & Hampton, Thomas R. Kaufman, Paul
Berkowitz for Defendants and Respondents.

Robert Bollinger sued Wolfgang Puck Catering and Events, LLC (WPC), Compass Group USA, Inc. (Compass), Carl Schuster, the CEO of WPC, and DeWayne Harrison, a Compass employee (collectively, respondents), asserting claims for harassment, discrimination, and wrongful termination based on his sexual orientation. He claimed the stated reason for his termination—that he had charged in excess of \$90,000 in personal expenses to a company credit card—was pretextual, and that the true reason for his dismissal was his sexual orientation.

Bollinger appeals the trial court’s grant of respondents’ motion for summary judgment and its denial of his motion for leave to amend his complaint. Finding no error, we affirm.

FACTUAL AND PROCEDURAL BACKGROUND

Bollinger was hired by WPC in 2005, initially as an assistant food and nutrition manager for WPC’s Century City Hospital location. Paul Rotmil, WPC’s Director of Human Resources, had extended the written offer of employment to Bollinger knowing Bollinger’s sexual orientation. Rotmil was himself openly gay. Bollinger became a Compass employee when Compass acquired a majority interest in WPC in September 2009.

Throughout Bollinger’s employment with WPC/Compass,¹ he understood he was an at-will employee. Bollinger was promoted several times, including on March 1, 2011, when Schuster promoted Bollinger to Regional Director of Operations. In this position, Bollinger ran day-to-day operations for WPC/Compass at its Sony Pictures Studios location. From that date until his termination Bollinger reported to Schuster.

¹ Respondents WPC and Compass will be referred to as WPC/Compass hereinafter, reflecting the acquisition of WPC by Compass early in the time period relevant to this matter.

Bollinger's work responsibilities included making many purchases. For this purpose, he was issued a corporate purchase card (P-Card) as early as March 20, 2007. Items charged to the P-Card were paid for by WPC/Compass. Bollinger was aware that his P-Card and related corporate charge account were for corporate purchases exclusively and that personal expenses were to be charged to a personal credit card and paid for personally. He also understood that "unauthorized use or deliberate waste of company cash, P-Cards, merchandise or product" was grounds for termination. In March 2012, Bollinger reviewed the WPC/Compass corporate P-Card policy and signed an "Owners Financial Commitments" document which stated that P-Cards were for "company use only."

Bollinger also understood company policy required that he keep accurate track of all charges made on the P-Card, fill out a company P-Card "Document Retention and Reconciliation Report" every month to identify the business purpose of each charge, and attach to that report receipts for purchases made that month.

Marty Behrends was the Director of Finance and Accounting for WPC/Compass. Behrends was responsible for financial oversight of certain business units of WPC/Compass, including Bollinger's.

Every Tuesday and Friday, Bollinger spoke with Behrends by telephone to review his unit's earnings, expenses and profitability. Every day, Bollinger spoke with another WPC/Compass employee, who also reported to Behrends; that employee was responsible for ensuring all employees were following company expense reporting policies. Bollinger also understood that Behrends's job duties included auditing Bollinger's P-Card use at any time to make sure Bollinger was following company policy.

On May 1, 2012, Behrends e-mailed Bollinger asking him to provide a business justification for a \$1,250 charge to “JE Auto Sales” that Bollinger had made on or about April 25, 2012, but had not “flushed” during one of their calls. In an e-mail exchange on the evening of May 5, 2012, Behrends renewed his inquiry; the same evening Bollinger responded, saying it was “a charge recouped with this week[']s NFL subsidy charges.”

On May 6, 2012, Bollinger sent an e-mail to an employee in WPC/Compass’s Human Resources Department and others, but not to Behrends, indicating he was planning to file a “formal Harassment claim against Martin Behrends.” Later on May 6, Behrends sent a follow-up e-mail to Bollinger, asking for more information about the JE Auto Sales charge. There is no evidence Bollinger responded.

On May 7, 2012, Bollinger lodged a complaint with WPC/Compass Human Resources accusing Behrends of harassing him, being rude, degrading him, and excessively scrutinizing his operations. Bollinger did not allege sexual orientation discrimination.

As a result of Bollinger’s complaint, Bollinger met with Schuster and Behrends. At the meeting, Behrends and Bollinger apologized to each other. Although Bollinger understood the matter was closed, he later claimed that following this meeting Behrends’s treatment of him grew worse: “right after that is when all of the audits started, and [Behrends] increased his harassment of me.”

On October 26, 2012, Behrends’s assistant e-mailed Bollinger about various P-Card transactions. Three days later, Bollinger e-mailed Human Resources saying, without elaborating, “I want to see if we can put an end to some issues that keep arising from the Finance team, before I am forced to take [it] to another level.”

The WPC/Compass Loss Prevention Department ultimately conducted an investigation of Bollinger's P-Card spending. Harrison, an investigator in WPC/Compass's Loss Prevention Department, interviewed Bollinger on December 4, 2012, in connection with the WPC/Compass investigation into whether Bollinger had misused his corporate charge account for personal purposes.

WPC/Compass concluded that its investigation of Bollinger's use and reporting of charges on his P-Card established that Bollinger had used his P-Card and corporate charge account over the course of several months to do the following: (1) purchase flowers for his mother (\$351.35), which he reported in a misleading manner; (2) rent an 18-passenger limousine (\$1,825) for his partner and two of his partner's clients, asking the limousine company not to report the rental as a limousine ride—he listed this rental on a P-Card report as “Espresso Machine repairs,” and never provided a receipt to WPC/Compass; (3) charge over \$800 of prescription “recreational drugs” for his personal use to WPC/Compass, while describing them on the reconciliation report as a “workmen's comp” charge; (4) pay \$2,777.26 for his personal condominium homeowner's association dues and not indicate the nature of this charge on his reconciliation report; (5) buy a \$313.20 plane ticket from Los Angeles to New York City for his partner; (6) pay \$5,099 for “Paypal Antiques” without prior approval. (Bollinger denied he made this purchase but did not provide any explanation for how it appeared among his P-Card charges.)

Bollinger was terminated by a memorandum sent to his home in Los Angeles on December 11, 2012, which advised him of the outcome of the investigation into his use of his P-Card and the reports on expenditures he had submitted to WPC/Compass. The memorandum concluded, “it has been

determined that you have violated the Company Policy and Procedures,” and notified Bollinger that his employment with WPC/Compass “will end effective [the next day].”

On February 28, 2014, Bollinger filed the initial complaint in this action alleging eight causes of action: (1) Harassment in Violation of the Fair Employment and Housing Act (FEHA); (2) Discrimination in Violation of FEHA; (3) Retaliation in Violation of FEHA; (4) Failure to Prevent FEHA Harassment and Retaliation; (5) False Imprisonment; (6) Invasion of Privacy; (7) Conversion; and (8) Defamation.

Respondents answered and filed a cross-complaint, each cause of action of which was predicated upon allegations that Bollinger had improperly used his P-Card to purchase personal items and services.

After respondents filed their motion for summary judgment or, in the alternative, summary adjudication, relating to all eight causes of action in Bollinger’s complaint,² Bollinger sought leave to file a first amended complaint. Respondents objected to two of the six causes of action as barred by the statute of limitations and objected to the others as untimely. On May 14, 2015, the trial court issued its ruling on the motion for leave to amend, conditioning the grant of Bollinger’s motion to add the four otherwise unchallenged causes of action on Bollinger paying respondents’ reasonable attorney fees and costs to be incurred in deposing Bollinger a second time on his new claims, and required him to make that payment by July 24, 2015.

On May 29, 2015, the trial court heard argument on respondents’ motion for summary judgment or adjudication and took the matter under

² The motion for summary judgment or adjudication is not in the record on appeal. As neither party has raised this as a defect, we take the tenor of this motion from the memorandum of points and authorities in support thereof, which is in the record.

submission, issuing its ruling on July 6, 2015. In that ruling, the court granted the motion in full as to the eight causes of action in Bollinger's February 2014 complaint.

On July 9, 2015, the court restated its earlier order that plaintiff would be allowed to file a first amended complaint containing the four recently added claims if he paid \$6,000 to defendants' counsel for the reasonably anticipated costs of their deposing plaintiff on the new allegations in the first amended complaint. No judgment was entered, however, as the deadline had not yet expired for Bollinger to pay the fees upon which the addition of the four new causes of action was conditioned.

On July 20, 2015, four days prior to the deadline for Bollinger to comply with the trial court's order to compensate respondents for costs associated with a second session of his deposition, Bollinger filed his notice of appeal. In an August 19, 2015 order the trial court stated that Bollinger had forfeited the right to add his four new causes of action because he had not complied with the order to pay the costs of additional discovery. The court ordered that he take nothing from respondents, and that respondents would recover costs of suit from Bollinger. Following entry of that order, respondents dismissed their cross-complaint with prejudice and, on September 14, 2015, the trial court entered judgment in favor of respondents based on the complaint as adjudicated on the earlier summary judgment.³

³ Thus, the judgment terminating the action in the trial court was filed two months after Bollinger filed his notice of appeal. While Bollinger's notice of appeal was premature, we deem it a timely appeal from the September 14, 2015 judgment. (Cal. Rules of Court, rules 8.104(d)(2) & (e); *Irving Nelkin & Co. v. South Beverly Hills Wilshire Jewelry & Loan* (2005) 129 Cal.App.4th 692, 699, fn. 5 [construing the predecessor rule of court]; see also *Olson v. Cory* (1983) 35 Cal.3d 390, 398-399.)

CONTENTIONS

Bollinger contends the trial court erred in two respects: First, he contends the court erred in ruling that two of the causes of action he sought to add did not relate back to the original complaint. Second, Bollinger contends the trial court's ruling granting summary judgment on the original, February 2014, complaint, must be reversed because the court applied the wrong legal standard.

Neither contention has merit.

DISCUSSION

I. Denial of Leave to Amend to Add Two Time-Barred Claims Was Proper

Bollinger contends the trial court erred in not allowing him to amend his complaint to add causes of action for (1) violation of Labor Code section 1102.5 (whistleblower retaliation) and (2) wrongful discharge in violation of public policy. The trial court's rulings were correct.

A. Additional Facts

On April 27, 2015, Bollinger filed his "Ex Parte Application to Amend Complaint, or, in the Alternative, Order Shortening Time Pursuant to Cal. Civ. Proc. Code, §§ 473(a)(1),"⁴ seeking leave of court to file his first amended complaint to add six causes of action. The court denied the ex parte application and heard the matter on regular notice on May 14, 2015. WPC/Compass opposed granting leave to amend as to the two causes of action which are the subject of this appeal, arguing, inter alia, that plaintiff

⁴ All further statutory references are to Code of Civil Procedure unless otherwise indicated.

had been dilatory to the prejudice of defendants⁵ and that the claims were barred by the applicable statutes of limitations. WPC/Compass opposed the other new causes of action for being untimely and requiring defendants to expend additional sums to re-depose Bollinger.

In its May 21, 2015 ruling, the trial court set out its reasons for denying leave to amend as to the two contested causes of action. The court observed that the Labor Code claim was subject to a two-year statute of limitations and the wrongful discharge claim, to a one-year statute of limitations. (See *Mathieu v. Norrell Corp.* (2004) 115 Cal.App.4th 1174, 1189).⁶

Noting that Bollinger had been terminated on December 12, 2012, and the original complaint had been filed on February 28, 2014, the court determined that Bollinger's new claims must have been asserted by December 12, 2014, unless they related back to claims timely filed earlier.

The court applied the well-established test, recently stated in *Pointe San Diego Residential Community, L.P. v. Procopio, Cory, Hargreaves & Savitch, LLP* (2011) 195 Cal.App.4th 265: To relate back to a timely-filed complaint, the new allegations must rest on the same general set of facts,

⁵ Defendants' earlier-filed motion for summary judgment was then on calendar for hearing. Bollinger had waited over two months after unsuccessfully first seeking from defendants a stipulation to the relief now requested before filing the application for leave to amend.

⁶ The statute of limitations for the Labor Code violation is actually one year based on Bollinger's claim for damages under Labor Code section 1102.5. (See Lab. Code, § 1102.5, subd. (f), § 340, subd. (a) [action for penalty allowable by statute] and *Melamed v. Cedars-Sinai Medical Center* (2017) 8 Cal.App.5th 1271, 1287-1288.) Thus, this claim had expired prior to the filing of the original complaint in February 2014. As discussed in the text, *post*, this claim would be barred even if the statute of limitations were two years as the trial court then thought.

involve the same injury and refer to the same instrumentality. (*Id.* at p. 276.)

The court then determined that neither new claim for relief related back. The reasons for this determination included that Bollinger’s theory had always been that he was terminated on the pretext of theft, but actually because of his sexual orientation, and he had never alleged he was terminated for any other reason, including but not limited to reporting Labor Code violations.

B. Applicable Law

We review the trial court’s denial of leave to amend for abuse of discretion. As articulated in *Bedolla v. Logan & Frazer* (1975) 52 Cal.App.3d 118: “[T]he trial court has wide discretion in allowing the amendment of any pleading [citations], [and] as a matter of policy the ruling of the trial court in such matters will be upheld unless a manifest or gross abuse of discretion is shown. [Citations.]” (*Id.* at pp. 135-136; accord, *Record v. Reason* (1999) 73 Cal.App.4th 472, 486.)

“[A]mendments alleging a new theory of liability against the defendant have been found to relate back to the original complaint, so long as the new cause of action is based on the same set [of] facts previously alleged. (See *Grudt v. City of Los Angeles* [(1970)] 2 Cal.3d [575,] at pp. 583–584 [amended complaint adding claim of negligence based on respondeat superior related back to original filing because it was based on the same alleged misconduct by police officers]; *Lamont v. Wolfe* [(1983)] 142 Cal.App.3d [375,] at pp. 378–380 [husband’s amended complaint for wrongful death related back to original complaint for loss of consortium because both claims were based on the same negligent acts of the defendants and the same injuries to the husband].) Likewise, an amendment seeking new damages relates back to

the original complaint if such damages resulted from the same operative facts—i.e., the same misconduct and the same injury—previously complained of. (*Walton v. Guinn* (1986) 187 Cal.App.3d 1354, 1362 [amendment adding new allegation of special damages related back because these damages resulted from the same injury and same accident alleged in original complaint].)” (*Amaral v. Cintas Corp. No. 2* (2008) 163 Cal.App.4th 1157, 1199–1200.) *Kim v. Regents of University of California* (2000) 80 Cal.App.4th 160, 168-169, is in accord: “An amendment filed after the statute of limitations has run will be deemed filed as of the date of the original complaint ‘provided recovery is sought in both pleadings on the same general set of facts.’” (*Austin v. Massachusetts Bonding & Insurance Co.* (1961) 56 Cal.2d 596, 600.) A newly pled cause of action rests upon the same facts when it involves the same accident and the same offending instrumentality. (*Goldman v. Wilsey Foods, Inc.* (1989) 216 Cal.App.3d 1085, 1094).” (*Id.* at p. 168.)

C. Application

There was no abuse of discretion in the trial court’s denial of leave to amend. The trial court correctly determined that the factual allegations in the proposed new claims were materially different and distinct from those originally alleged. The original allegations were of Labor Code violations with respect to discrimination based on sexual orientation. There is no suggestion in the original complaint of facts to support the whistleblower allegations or wrongful discharge in violation of public policy. As the trial court explained, to support the new claims of retaliation based on alleged union activities, the proposed first amended complaint adds “approximately 22 new preliminary factual paragraphs” “directed solely to the new causes of action” We agree with the trial court that the newly alleged facts are

materially different from those in the original complaint and that “the facts in the original complaint cannot bear the weight of the new theor[ies] added by amendment.” (Citing *Rodriguez v. Airborne Express* (9th Circ. 2001) 265 F.3d 890, 899.)⁷

II. The Trial Court Correctly Applied Summary Judgment Principles in Granting Defendants’ Motion

Bollinger’s sole contention with respect to the trial court’s order granting the defendants’ motion for summary judgment is that the trial court treated the motion for summary judgment in this case as a motion for judgment on the pleadings, or should have. In so doing, he relies on *American Airlines Inc. v. County of San Mateo* (1996) 12 Cal.4th 1110, in

⁷ Within Bollinger’s 24-page statement of facts in his opening brief is a claim that the trial judge erred in conditioning the granting of his motion for leave to amend as to the other four new causes of action on his payment to respondents of \$6,000 for the anticipated costs of again taking his deposition to conduct discovery on these new claims. Bollinger states in his brief that he did not have the ability to make this payment and bases that statement on his being “a litigant who had lost his job, and been unable to replace it for 3 years.”

Nothing we have located in the record on appeal indicates that he ever made this alleged lack of funds known to the trial judge, and respondents state in their brief that Bollinger did not raise this issue below. Nor does Bollinger deny that, in granting a motion under section 473, subdivision (a), a court may impose conditions, including that the successfully moving party may be ordered to pay certain costs and fees incurred by the opposing party if the motion is granted. (§§ 473, subd. (a)(2), 576; see *Fuller v. Vista Del Arroyo Hotel* (1941) 42 Cal.App.2d 400, 404.) As respondents point out, Bollinger does not dispute that his new allegations create the need for respondents to conduct additional discovery and thus incur additional costs.

Bollinger’s failure to raise below this issue of lack of funds bars its consideration on appeal. (*Hearn v. Howard* (2009) 177 Cal.App.4th 1193, 1207; see *Feduniak v. California Coastal Com.* (2007) 148 Cal.App.4th 1346, 1381, citing *Kolani v. Gluska* (1998) 64 Cal.App.4th 402, 412.)

which our Supreme Court discussed how a court analyzes a motion for summary judgment when it “is used to test whether the complaint states a cause of action” (*Id.* at pp. 1117-1118.) Indeed, the sole basis for Bollinger’s contention that the trial court erred is that it did not accept that “[t]he claims in Bollinger’s complaint are ‘adequate so long as it [*sic*] apprises [Defendant’s] [*sic*] of the factual basis for the claim.’” Bollinger’s contention is without merit.⁸

A. *Standard for review*

Summary judgment is granted when a moving party establishes the right to entry of judgment as a matter of law. (§ 437c, subd. (c).) A defendant moving for summary judgment bears the initial burden of proving that there is no merit to a cause of action by showing that one or more elements of the cause of action cannot be established or that there is a complete defense to that cause of action. (§ 437c, subd. (p)(2); *Cucuzza v. City of Santa Clara* (2002) 104 Cal.App.4th 1031, 1037.) Once the defendant has made such a showing, the burden shifts to the plaintiff to show a triable issue of one or more material facts exists as to that cause of action or as to a defense to the cause of action. (*Aguilar v. Atlantic Richfield Co.* (2001) 25 Cal.4th 826, 849.) If the plaintiff does not make such a showing, summary judgment in favor of the defendant is appropriate. In order to obtain a summary judgment, “all

⁸ Bollinger does not challenge the summary judgment motion on any other basis. Nor does he raise any issue about the timing of the order granting the motion for summary judgment, on July 6, 2015, prior to the termination of his ability to add the four new causes of action, on July 24, 2015, as ordered on August 19, 2015. We note that the sequence of events in the trial court suggests the motion granted was not appropriately labeled a summary judgment motion based on the existence of claims for relief that were conditionally extant at the time the summary judgment motion was granted. As no party has raised this issue, we need not resolve it.

that the defendant need do is to show that the plaintiff cannot establish at least one element of the cause of action [T]he defendant need not himself conclusively negate any such element” (*Id.* at p. 853.) Review of the trial court’s grant of summary judgment is de novo and we decide independently whether the facts not subject to triable dispute warrant judgment for the moving party as a matter of law. (*Intel Corp. v. Hamidi* (2003) 30 Cal.4th 1342, 1348; § 437c, subd. (c).)

B. Application

Bollinger’s argument suffers from a fundamental flaw: The trial court did not do what he contends on appeal. Bollinger’s argument ignores that the respondents brought a fact-intensive motion for summary judgment which Bollinger opposed with his own factual presentation.

Bollinger’s argument also ignores the careful analysis evidenced by the trial court’s 14-page minute order in which the court ruled on evidentiary objections and a request for judicial notice and, then, for each of Bollinger’s claims for relief, analyzed the evidence presented by each party and the law applicable before concluding that Bollinger had not presented any triable issue of fact on any of the causes of action in his original complaint, or that certain of his claims for relief were time-barred or otherwise without merit.⁹

⁹ In its ruling addressing each of the causes of action alleged in the original complaint, the trial court first set out the facts established by the parties and their respective legal arguments before explaining for each claim the court’s ruling that defendants had carried their factual and legal burden and Bollinger had not sufficiently (or at all) rebutted it. We summarize those rulings as follows: on the first cause of action for harassment, defendants established that Bollinger cannot prove his prima facie case; on the second cause of action for discrimination, defendants sufficiently rebutted the presumption of discrimination and plaintiff did not meet his burden to raise a triable issue that the reasons for his termination were a pretext for discrimination; on the third cause of action for retaliation, defendants carried

The arguments which Bollinger makes on appeal are simply inapposite; none of his arguments meets his burden of establishing error in the trial court's rulings. In the absence of such a showing, we presume the trial court's judgment is correct. (*Claudio v. Regents of University of California* (2005) 134 Cal.App.4th 224, 252; *Frank and Freedus v. Allstate Ins. Co.* (1996) 45 Cal.App.4th 461, 474.)

The trial court engaged in "classic" summary judgment analysis to comply with section 437c, to determine whether, based on the facts adduced by the parties as set out in their separate statements, each particular cause of action left matters to be tried. It concluded for well-stated reasons that there remained no such matters. Bollinger engaged and participated fully in this process, as discussed above. His claims to the contrary on appeal lack factual support and legal merit.

their burden to show plaintiff was terminated for a legitimate, nonretaliatory business reason; the fourth cause of action alleging failure to take steps necessary to stop harassment was derivative of the first and third causes of action and fails for the same reasons; both the fifth and eighth causes of action for false imprisonment and defamation are barred by the one-year statute of limitations; on the sixth cause of action for invasion of privacy, Bollinger did not have a reasonable expectation of privacy in his expense reports and did not submit any evidence to support his claim; and no facts supported Bollinger's seventh cause of action for conversion.

DISPOSITION

The judgment is affirmed. Respondents are to recover their costs on appeal pursuant to California Rules of Court, rule 8.278(a)(1).

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GOODMAN, J.*

We concur:

CHAVEZ, Acting P.J.

HOFFSTADT, J.

* Retired judge of the Los Angeles Superior Court assigned by the Chief Justice pursuant to article VI, section 6 of the California Constitution.